FILE COPY

Office Supreme Court, U. S.
FILED
MAY 2 1924
WM. R. STANSBURY
CLERK

IN THE

# Supreme Court of the United States

No. 265.

29

TRANSPORTES MARITIMOS DO ESTADO,

*Plaintiff-in-Error,*

—against—

SYLVIO A. ALMEIDA,

*Defendant-in-Error.*

## BRIEF OF PLAINTIFF-IN-ERROR IN REPLY.

F. DUDLEY KOHLER,
*Attorney for Plaintiff-in-Error,*
No. 25 Broadway,
New York City.

## SUBJECT INDEX.


PAGE

I—The Seaman's Act does not confer jurisdiction on the United States District Court in this case ..... 1

II—The direct appeal to this Court was and is proper ..... 7

III—The proof of the sovereign status of the plain-in-error is competent and sufficient ..... 11

IV—The Republic of Portugal never waived its objection to jurisdiction or its rights to immunity in this case ..... 17

V—The suggestion of the Minister of the Republic of Portugal was submitted in the District Court in the only proper and possible manner ..... 20

VI—The assumption of Jurisdiction by the District Court herein and entry of the judgment against the plaintiff-in-error, was and is a violation of the existing treaty between the United States and the Republic of Portugal. 25

VII—Appendix "A," Treaty Series No. 511/2, Commercial Arrangement effected by Exchange of Notes between the United States and Portugal, signed at Washington, June 28, 1919 ..... 31

## TABLE OF CASES CITED.


| | PAGE |
|---|---|
| *Adriatic, The*, 258 Fed. 902, 904 ..... | 14, 21, 22, 24 |
| *Agency, etc. Co. v. American, etc. Co.*, 258 Fed. 363 | 14 |
| *Alus, The*, 242 Fed. 954 ..... | 34 |
| *Alberzen, The*, 223 Fed. 443 ..... | 6 |
| *Anne, The*, 3 Wheatley 435 ..... | 23 |
| *Attualita, The*, 238 Fed. 912 ..... | 14, 20 |
| *Baiz, In re*, 135 U. S. 403 ..... | 21 |
| *Belgenland, The*, 114 U. S. 355 ..... | 3 |
| *Carlo, Poma*, 259 Fed. 396 ..... | 14 |
| *Campania Mercantil Argentina, The, v. The U. S. Shipping Board*, Ct. Ap. London ..... | 15 |
| *Chicago v. Mills*, 204 U. S. 321 ..... | 10 |
| *Claveresk, The*, 264 Fed. 276, 289 ..... | 14 |
| *Constitution*, L. R. 4 P. D. 39 ..... | 24 |
| *Commercial Mutual Accident Co. v. Davis*, 213 U. S. 245 ..... | 10 |
| *Cosmopolitan Mining Co. v. Walsh*, 193 U. S. 460 | 10 |
| *Cunard S. S. Co. v. Smith*, 255 Fed. 846 ..... | 8-9 |
| *Davis*, 213 U. S. 245 ..... | 10 |
| *Eolo, The* (1918) ..... | 14 |
| *Ester, The*, 190 Fed. 217 ..... | 3 |
| *Exchange, The*, 7 Cranch 116 ..... | 14, 24 |
| *Fishbank v. Western Union Tel. Co.*, 161 U. S. 96 | 10 |
| *Foster v. Neilson*, 2 Peters 253 ..... | 26 |
| *Giles v. Harris*, 189 U. S. 475 ..... | 10 |
| *Gunny, The*, 1 Am. Maritime Cases, 425 ..... | 6 |
| *Holden v. Goy*, 17 Wall. 211 ..... | 26 |
| *Hussein Lufte Bey*, 256 U. S. 216 ..... | 21, 23 |

PAGE

*Imberhorne, The*, 240 Fed. 830 ..... 3
*In re Republic of Bolivia Exploration Syndicate, Ltd.* Law Reports (1914) 1 Ch. 139 ..... 17
*Ixion, The*, 237 Fed. 142 ..... 3, 4

*Jassy, The* (1906), p. 27, 273 ..... 18
*Johnson v. Gearlds*, 234 U. S. 422 ..... 9
*Judicial Code*, Sec. 24 ..... 9

*Leighton v. United States*, 29 Ct. Cl. 288 ..... 28

*Martin v. Hunters Lessee*, 1 Wheat. 304 ..... 26
*Maipo, The*, 252 Fed. 627 ..... 14, 21, 22, 24
*McGovern v. Philadelphia & C. R. Co.*, 235 U. S. 389 9
*Minnesota v. Northern Securities Co.*, 194 U. S. 48 11
*Moodie v. The Phoebe Anne*, 3 Dall. 319 ..... 26
*Muir, Ex Parte*, 254 U. S. 522 .....21, 23

*Netherlands Consular Convention*, Aug. 1st, 1879, Art. 11 ..... 25
*Norway Treaty of July 4, 1827* (8 Stat, 352, Art 13)

*Oliver Am. Trading Co. v. U. S. of Mexico, et al.*, No. 622 docket Apr. 7, 1924 ..... 11, 29

*Parlement Belge*, L. R. 5 P. D. 197 ..... 14-18
*Pesaro*, 255 U. S. 216 ..... 21, 23

*Reichart v. Felps*, 6 Wall. 160 ..... 26
*Rindjani*, 254 Fed. 913 ..... 6
*Roscric*, 254 Fed. 154 ..... 13, 14, 20, 21, 24

*Salomon, The*, 29 Fed. 534 ..... 6
*Sapphire*, 11 Wall. 164 ..... 24
*Smith v. Stevens*, 10 Wall. 321 ..... 26
*Stanley v. Schwalby*, 147 U. S. 508 ..... 20
*State of N. Y., Ex Parte*, 256 U. S. 490 ..... 21
*Sweden Treaty of June 1, 1910, Rogday*, 279 Fed. 130 ..... 21, 22

*Taylor* v. *Best*, 14 C. B. 487 ..... 17
*Tampico, The*, 16 Fed. 491 ..... 21

*U. S.* v. *Perchman*, 7 Peters 51 ..... 26
*U. S.* v. *Dickelman*, 92 U. S. 520 ..... 3
*U. S. Schooner Peggy*, 1 Cranch 103 ..... 26

*Vance* v. *W. A. Vandercook Co.*, 170 U. S. 468.... 11

*Wetmore* v. *Rymer*, 169 U. S. 115 ..... 10
*Wildenhaus' case*, 120 U. S. 11 ..... 3
*Wilson* v. *Wall*, 6 Wall. 83 ..... 26

# Supreme Court of the United States.

No. 265.

---

TRANSPORTES MARITIMOS DO ESTADO,
*Plaintiff-in-Error,*

—against—

SYLVIO A. ALMEIDA,
*Defendant-in-Error.*

---

## *BRIEF OF PLAINTIFF-IN-ERROR IN REPLY.*

### POINT I.

**The Seaman's Act does not confer jurisdiction on the United States District Court in this case.**

1. The section on which the defendant-in-error relies is Section 4 of the Seaman's Act of March 4, 1915 (Section 4530 of the Federal Statutes Annotated, Vol. 9, p. 158). This section provides that any court having jurisdiction may take action to enforce the rights therein given, to wages of any seaman on a vessel of the United States, and provides at its close:

> "That this action shall apply to seamen *on foreign vessels while in harbors of the United States*, and the *courts of the United States* shall be open *to such seamen* for its 'enforcement.'"

Section 4529 of the United States Revised Statutes, also a point of the Seaman's Act, Section 3 (Federal Statutes Annotated, Vol. 9, p. 156) pleaded by the defendant-in-error provides that the master or owner of certain vessels, therein enumerated shall pay the wages due to seamen within two days after the termination of the shipping agreement or after his discharge and provides a penalty for non-payment, "*which* sum shall be recoverable *as* wages in any claim made before the court" (Record, p. 3).

These sections, where they confer any jurisdiction, confer only jurisdiction in Admiralty.

Neither of these sections have any application to the case at bar. The Section 4530 is the only one which confers jurisdiction on the Court in the case of a claim of a foreign sailor, and Section 4529 does not in any way enlarge this jurisdiction, but merely provides that the penalty may be recovered in any claim made before the Court. *Section 4530* is confined in its application to claims of seamen on foreign vessels *while said vessels are in the harbors of the United States;* that is to seamen whose shipping agreement terminates while the vessel in which he shipped is in our ports or to seamen who are discharged from a foreign vessel while it is in our port. The record in this case shows that the shipping agreement of the defendant-in-error terminated at Lisbon or that he was discharged at Lisbon, while his vessel the "Goa" was in the port of Lisbon (Record, p. 11). The voyage terminated at Lisbon (Answer, Record, p. 5). This man remained in Portugal for some time and then was returned by the defendant *as a passenger* on another ship, the

"Cunene" (Record, p. 11). There is nothing in this case to show that the "Goa" was in a port of this country when the voyage terminated or when the defendant-in-error was discharged or that she ever returned to this country. The jurisdiction of the United States Courts in these cases of wages of a foreign seaman against a foreign vessel are confined according to the statute which must be strictly construed to "seamen on foreign vessels while in *harbors* of the United States, and also the said jurisdiction is similarly restricted according to the decisions of our courts." (*The Ixion*, 237 Fed. 142; *The Talus*, 242 Fed. 954; *The Imberhorne*, 240 Fed. 830; *The Ester*, 190 Fed. 217.) In this last case the Court said:

> "The Merchant vessels of one country visiting the ports of another for the purposes of trade subject themselves to the laws which govern the port they visit, *so long as they remained.*" *United States* v. *Dickelman*, 92 U. S. 520; *Wildenhaus'* case, 120 U. S. 11.

In the absence of treaty stipulations, the Courts of admiralty have civil jurisdiction in all matters pertaining to the foreign ship while in port, and also in certain cases when the Court has the vessel in its territorial jurisdiction, although the cause of action arises on the high seas. *The Belgenland*, 114 U. S. 355, *Wildenhaus'* Section 4530 in other respects shows the limitation of its application here contended for. It says:

> "Every seaman shall be entitled to receive one-half part of the wages which *he shall have then* earned, *at every port* where such vessel, after the voyage has been commenced, *shall load or deliver cargo* before its voyage has ended. And when the

> voyage is ended every such seaman shall be entitled to the remainder of the wages which shall *then be due him.*"

As said in the *Talus* (242 Fed. 954), the use of the expression "'one-half the wages which he shall have then earned' can only indicate that it was the intention of Congress to give seamen the right to demand one-half of all the wages which such seamen shall have earned at the time of the demand made, at every port where such vessel shall load or deliver cargo" were clearly meant to show when and also where the demands could be made, that is when and where they became due, and when the vessel was in the harbor. The same construction should evidently be given to the expressions "shall then be due" at the end of the voyage when the vessel is in a harbor of the United States.

Any other idea of the law would be illogical and unreasonable. Under the view contended for by the defendant-in-error, an alien seaman discharged from a foreign vessel in a foreign port could come to this country and sue the employer, also an alien, in our courts in spite of the fact that the United States Courts have no jurisdiction in actions between aliens. This defendant-in-error is in every sense an alien. There is no claim even that the wages sued for were earned while in a port of the United States (*The Ixion, supra*). The "Goa" is a foreign vessel. Its owner was the sovereign government of the Republic of Portugal, and it was not in a port of the United States or within its jurisdiction at the time the alleged claim arose.

The statute, the Seaman's Act, in every sense contemplates a proceeding against the vessel; that is, it confers

admiralty jurisdiction and only admiralty jurisdiction in the cases specified. Section 4547 (Federal Statutes Annotated, p. 168) provides for the issue of process against the vessel. There is no provision anywhere in the law for an action against the owner of the vessel at law and not even for an action in admiralty *in personam* against the owner. These facts indicate also that it was the purpose of Congress to confine the application of the statute to claims of seaman's wages only to cases where the vessel was in a harbor of the United States or in the jurisdiction of the Court and to give a remedy against the vessel in admiralty to seamen on such vessel. In this case the writ was one in an action at law by an alien against his alien employer, with an attachment against the "Cunene," on which he had never been a seaman. This was a proceeding not contemplated by the statute. After leaving the "Goa" after his discharge in Portugal he came to this country as a passenger and in his capacity as any other citizen of a foreign government sued his employer at law in this country, on a breach of contract. It makes no difference what the nature of the contract was or how it arose the suit is truly that of one alien against another and not that of a seaman of a foreign vessel against that vessel while in a harbor of the United States as contemplated and provided for in the Seaman's Act. It is moreover an action between aliens for breach of a contract made on Portuguese territory in the Consulate or on a Portuguese ship and wholly to be performed on a Portuguese ship, that is, within the territory and jurisdiction of Portugal.

II. Since the Seaman's Act confers only admiralty jurisdiction as will be apparent from a reading of all its provisions as to suits by sailors against vessels, and this action is at law it is not within the Seaman's Act and the Court has no jurisdiction herein.

III. Since the Seaman's Act does not confer jurisdiction in this case there is nothing in the Seaman's Act in conflict with any treaty with Portugal and Section 16 of that act does therefore not abrogate such treaty. Under the provisions of the most favored nation clause in the treaty with Portugal, Appendix A attached, the consular authorities of Portugal should have exclusive jurisdiction of controversies between the captains and members of crews of vessels of that nation, in as much as similar provisions, treaties and agreements have been made with other nations and under this most favored nation clause in this treaty with Portugal, the Courts of the United States are without jurisdiction in this action between a Portuguese seaman, an alien, and this plaintiff-in-error, even if it were merely an alien and not a sovereign, as is the fact in this case. (*The Rindjani*, 254 Fed. 913; *The Alberzen*, 223 Fed. 443, *The Ester*, 190 Fed. 216; *The Gunny*, 1 *Am. Maritime cases*, 425; *The Salomon*, 29 Fed. 534.)

IV. The Seaman's Act even where it confers jurisdiction in actions for wages against foreign vessels does not confer jurisdiction over a foreign sovereign or any vessel which is its sovereign property.

## POINT II.

### The direct appeal to this Court was and is proper.

1. The sole question at issue on this appeal is that of the lack of jurisdiction of the District Court in this action either because of the sovereignty of the plaintiff-in-error and its consequent immunity, or because the action is an action at law between aliens and one over which a Federal Court has no jurisdiction.

The questions of jurisdiction involved in this appeal, aside from the sovereign immunity of the plaintiff-in-error, are not questions of general jurisdiction applicable to state as well as federal courts, but are questions of the jurisdiction of the District Court as a Federal Court.

2. This action was brought under the Seaman's Act (Complaint, Rec., p. 3) at law by an alien seaman for wages earned on a foreign vessel on a voyage for which he had shipped beginning at New York and terminating at Lisbon, where he was discharged, and paid off and on a simple contract thereto added to provide him with passage back to New York (Record, pp. 3, 4, 5, 11). The contract was one entered into on Portuguese territory in its Consulate (Record, p. 2) to be performed outside of the United States and on a voyage terminating in Portugal, where he left the ship which was not thereafter in a harbor of the United States. The Seaman's Act, a Federal Statute, only confers jurisdiction upon a United States Court to entertain a libel against a vessel while she is in a harbor of the United States for wages then earned and due; that is it confers jurisdiction

under such circumstances only *in admiralty* against the vessel. It confers no jurisdiction against the owner *in personam* nor at law (Point I, *supra*).

It certainly does not give the right to an alien, regardless of the nature of his claim, to come to this country, after discharge by his employer, as a passenger and sue his alien employer here in the United States Court for a mere breach of contract. Therefore the District Court as a Federal Court, had no jurisdiction in this case under the Seaman's Act. This Act confers no jurisdiction in cases of this kind upon any State Court at all. Consequently it will be clear that the jurisdiction claimed in this case by the defendant-in-error was the jurisdiction of the District Court as a Federal Court based upon a Federal Statute which conferred a certain limited and specific federal jurisdiction, in admiralty *in rem*, upon that Court as a Federal Court (Point I, *supra*).

3. As the District Court acquired no jurisdiction under the Seaman's Act to entertain this action, the jurisdiction of the Court as a Federal Court must be governed by other rules. The District Court as a Federal Court is without jurisdiction because, the action, not being authorized by the Seaman's Act, it is merely an action at law between aliens for a breach of contract in which the amount involved is less than $3,000 (Judicial Code, Sec. 24). An action at law between aliens cannot be maintained in a United States District Court where, as in this case, no federal question is involved in the basis of the claim, and it cannot obtain such jurisdiction by consent, and therefore not by a waiver of the parties (*Cunard S. S. Co.* v. *Smith*, 255

Fed. 846 and other cases cited in Point V, p. 26 of the main brief herein of the plaintiff-in-error). A Federal Court has no jurisdiction of suits between aliens (Judicial Code, Sec. 24; Federal Statutes Annotated, Vol. 4, p. 838, and at p. 973, Sec. XIV and cases there cited).

4. As the amount involved is less than $3,000, the United States District Court is for this reason under the Federal Statutes without jurisdiction in the case (Judicial Code, Sec. 24).

It will be evident from the foregoing that the question of jurisdiction in this appeal is not one of general jurisdiction but one of the jurisdiction of the District Court as a Federal Court and that these grounds are sufficient to bring the case within the rule under which the appeal should be taken directly to this Court on the question of jurisdiction, aside from the question of the want of jurisdiction of the Court over the plaintiff-in-error as an independent sovereign.

5. In this case moreover on the question of jurisdiction the construction of a treaty between the United States and the Republic of Portugal (Appendix A) of which this Court can take judicial notice, is involved in the disposition of this case, and this fact further serves to bring this case within the rule of Section 238 of the Judicial Code, directing an appeal from the District Court direct to this Court as within its exclusive appellate jurisdiction. (*Johnson* v. *Gearlds*, 234 U. S. 422; *McGovern* v. *Philadelphia &c. R. Co.*, 235 U. S. 389.)

6. Even though the Treaty may not have been referred to in the Record herein, as under the Treaty this question is here involved, and this Court may take

judicial notice of all treaties, it may in this case of a general appeal, with a sole question of jurisdiction certified, proceed to determine all the questions, since the appeal opens the whole case (*Giles* v. *Harris*, 189 U. S. 475). The question of the nature of this action as one at law between aliens for only $485, is necessarily involved in the decision of this case on the question of jurisdiction, and as the record herein contains the evidence of this fact of the nature of the action, it is properly before this Court on this writ of error herein (*Wetmore* v. *Rymer*, 169 U. S. 115; *Chicago* v. *Mills*, 204 U. S. 321; *Commercial Mutual Accident Co.* v. *Davis*, 213 U. S. 245). The record in this case, and not the certificate of the trial Judge furnishes the basis for determining whether the suit presents questions for the determination of this Court upon the issues involved (*Cosmopolitan Mining Co.* v. *Walsh*, 193 U. S. 460). If an appeal be taken upon one question of jurisdiction mainly, as of sovereignty of the plaintiff-in-error, the judgment may be reversed for a fatal defect of jurisdiction on another ground shown in the record, *e. g.*, the nature of the action herein as one at law between aliens which clearly appears on the record herein (*Fishback* v. *Western Union Tel. Co.*, 161 U. S. 96). The record of the case must *affirmatively show jurisdiction* in the District Court, and as in this case the record does not affirmatively show such jurisdiction, but it does show affirmatively the lack of such jurisdiction as it shows (Record, pp. 3, 4, 5, 11) that it is an action between aliens and not sanctioned by the Seaman's Act (Point I, *supra*) this Court, of its own motion should so declare and make such an order as will prevent the District Court from exercising an authority not conferred upon it by Statute (*Min-*

*nesota* v. *Northern Securities Co.*, 194 U. S. 48; *Vance* v. *W. A. Vandercook Co.*, 170 U. S. 468). If the appellate jurisdiction of this Court should be deemed to fail as far as one question of jurisdiction raised is concerned and another fatal to that jurisdiction appears in the record the Court may reverse the judgment.

7. In any event if this Court should deem that the appeal is not properly before it because the question of sovereign immunity is a question of general law, and no question of the jurisdiction of the District Court as a Federal Court is involved in this appeal, then as stated in the case of the *Oliver American Trading Co.* v. *The Government of the United States of Mexico, et al.*, (No. 622) decided April 7, 1924; "the case must be transferred to the Circuit Court of Appeals for the Second Circuit (Section 238 (a) of the Judicial Code, Act of September 14, 1922, c. 305, 42 Stat. 837)" and it should be so ordered.

## POINT III.

### The proof of the sovereign status of the plaintiff-in-error is competent and sufficient.

1. The plaintiff-in-error, Transportes Maritimos Do Estado was shown by the testimony of Alvaro A. N. Ribeiro and by the documents submitted in Defendant's Exhibit A to B, to be an integral part of the sovereign government of Portugal (Record, pp. 12-13). Senor Ribeiro testifies as the director and therefore the head of the Transportes Maritimos Do Estado, that as to what its entity is and it would seem that the testimony of the

head of such an entity, be it a corporation or not, would be most competent to prove the facts as to what that entity actually was. In his testimony he states directly, not as a conclusion, but as a fact that the Transportes Maritimos Do Estado is a department of the government of Portugal. His testimony is clearly to the effect that the Transportes Maritimos Do Estado is not a corporation, that it has no capital stock or stockholders, and, as stated, that it is actually a department of the sovereign government of Portgual (Exhibit A, attached to Record, pp. 24-55).

2. Not only do we have the testimony of Senor Ribeiro, but there is also attached to the Commission actual copies of the decrees of the government of Portugal, under which the Transportes Maritimos Do Estado was organized and exists, both in Spanish and in Portuguese and in translation thereof in English (Exhibit A, *supra*, pp. 82-92). The originals of these papers and documents were all duly and properly authenticated and certified by the Minister of Foreign Affairs of the government of Portgual (Exhibit A, *supra*, p. 30) and as required upon the proper execution of the Commission for the taking of testimony for use in the District Court.

This testimony, as stated, clearly proves that the Transportes Maritimos Do Estado is a department and part of the sovereign government of Portugal by stating the facts from which this conclusion must be drawn, and it is for the Court, upon this testimony to draw this conclusion. It must follow as a matter of strict logic that if the government of Portugal is sovereign and immune, then an integral part of that government, as the Transportes Maritimos Do Estado is shown to be, must partake of the sovereignty and

immunity of that government. Its status with reference to the government of Portugal is in all essentials equivalent, as shown by this testimony, to that of the United States Shipping Board with reference to the United States of America, and the sovereignty and immunity of the United States Shipping Board as a part of the government of the United States of America is well known and by all conceded.

3. The suggestion of the Minister of Portugal filed herein also stated that the Steamship "Goa" mentioned in the complaint herein was owned by the Republic of Portugal, and that the Transportes Maritimos Do Estado was not a corporation but was a department of the aforesaid government of Portugal and that as such, a part of said government of the Republic of Portugal, and a sovereign, it was not subject to the jurisdiction of the court. These allegations were made by an officer or official of the government of Portugal of the proper diplomatic status to render him a proper person to make such allegations and to claim immunity on behalf of his said government, and his statements are therefore competent as evidence of the sovereign statutes of the said Republic of Portugal.

4. The suggestion of the Minister is conclusive. The defendant-in-error contends that the Court is not warranted in acting upon this suggestion. In as such as the defendant-in-error did not traverse or deny the contents of the suggestion in any way and it was admitted in evidence without objection or exception, it is in any event conclusive as to all material statements of fact. (*The Roseric*, 254 Fed. 154.) There is abundant authority that such a suggestion is conclusive. (*The Parlement*

*Belge*, L. R. 5 P. D. 197; *The Exchange*, 7 Cranch 116; *The Claveresk*, 264 Fed. 276, 280; *The Maipo*, 252 Fed. 627; *The Roseric*, 254 Fed. 154; *The Attualita*, 238 Fed. 912; *The Eolo* (1918) (Ir. 78.). In *The Parlement Belge*, *supra*, Lord Justice Brett said:

> "The ship has been by the sovereign of Belgium, by the usual means, declared to be in his possession as a sovereign, and to be a public vessel of the State. It seems very difficult to state that any court can inquire by contentious testimony whether that declaration is or is not correct. To submit to such an inquiry before the Court is to submit to its jurisdiction. It has been held that if the ship be declared by the sovereign authority by the usual means to be a ship of war, that declaration cannot be inquired into. That was expressly decided under very trying circumstances in the case of *The Exchange*, 7 Cr. 116. Whether the ship is a public ship used for national purposes seems to come within the same rule."

In *The Claveresk*, *supra*, the Circuit Court of Appeals for the Second Circuit said that it felt "no inclination to depart from the rulings of the *Carlo Poma*, 259 Fed. 396, and *Agency, etc., Co.* v. *American, etc., Co.*, 258 Fed. 363, holding that a certificate such as this, describing a certain act and avowing it as governmental, is to be taken as verity." The Circuit Court of Appeals for the Third Circuit reached the same conclusion in *The Adriatic*, 258 Fed. 902, 904. The defendant-in-error has at no time challenged the facts suggested, and his suggestion that the suggestion is not conclusive or competent is contrary to established principle and practice.

5. That the said Exhibit A (10) of plaintiff-in-error, *supra*, containing testimony of Mr. Ribeiro and the copies of the aforesaid documents and also plaintiff-in-error's Exhibit B containing the suggestion of the Minister of Portugal *were admitted as evidence in this case without objection or exception* and therefore they and their contents *are properly before this Court and competent as evidence of the facts therein contained as to the entity and nature and status of the plaintiff-in-error* in this case in its relation to the government of Portugal and its consequent sovereignty and right to immunity by reason thereof. The testimony of Mr. Ribeiro, as stated, as the head and director of the Transportes Maritimos Do Estado, and the decrees of that government itself are clearly the best evidence of what the Transportes Maritimos Do Estado actually is in fact and the statement in evidence of the Minister is clearly competent as to the constitution and sovereign character of his government and its departments. Moreover, the testimony of Mr. Ribeiro and the decrees were obtained through a Commission duly issued out of the United States District Court for the Southern District of New York and duly and properly executed and returned to that court in the form prescribed by its practice and accepted by that court and inasmuch as it was as such admitted in evidence in this case by that Court *without exception or objection of counsel* as of the same force and effect as though it had been taken in this case instead of in the case in which it was actually taken, objection should not be permitted to be taken and sustained to its competency at this time.

6. In a case decided about two weeks ago in the Court of Appeals in London, *the Compania Mercantil Argentina v. The United States Shipping Board*, the United States Shipping Board was sustained in its contention

that as *a sovereign body it could not be sued.* In that case, after an offer of settlement under arbitration of the point in dispute had been declined by the Argentine Company, the Shipping Board withdrew its arbitrator. The Argentine Company, as plaintiffs, then started proceedings and the Board replied that it was a sovereign body and *could not be sued.* The Lord Justice Bankes in his judgment quoted a statement of the *Legal Advisor* of the Shipping Board in London that the Board was simply the Executive Branch of the Government of the United States for the purpose of acquiring and controlling a mercantile marine in the interest of the State. His view was that a sovereign sate could not be sued.

In the respect indicated above, the United States Shipping Board is practically identical with that of the Transportes Maritimos Do Estado as proven by the evidence of Mr. Ribeiro and the documents contained in the Exhibit A of the plaintiff-in-error, *supra.* As the United States Shipping Board is a branch of the United States Government, so the Transportes Maritimos Do Estado is a department of the Government of Portugal existing for the same reasons and purposes.

In this case too the United States Shipping Board was not obliged by the English Court to submit its suggestion through "diplomatic channels" or in fact to file any suggestion or information of the United States Minister or Ambassador at all. It accepted and treated as sufficient the statement of the United States Shipping Board's legal adviser, that is, its counsel, as sufficient to show the *sovereign status* of the Shipping Board. If the United States Shipping Board was immune in that case, then the Transportes Maritimos Do Estado, which is exactly the same kind of an entity and bears the same status to Portugal, is also immune.

## POINT IV.

**The Republic of Portugal never waived its objection to jurisdiction or its rights to immunity in this case.**

This point the plaintiff-in-error believes has been covered in its main brief in Point II thereof, pages 9-17. It has there been shown that a general appearance and answer is not a waiver of immunity and cannot be so regarded, particularly where the objection to jurisdiction and the right to immunity is set up in the answer.

1. *In re Republic of Bolivia Exploration Syndicate, Limited.* Law Reports (1914) 1 Ch. 139, where there was a general appearance, Asbury, Judge, says on this point (italics ours):

> "It seems to me that both at common law and under the statute all writs against foreign public ministers accredited to the Court of this country are absolutely null and void, and that if and so far as waiver of that diplomatic privilege is possible it must be confined to cases of some very special nature as was the case in *Taylor* v. *Best*, 14 C. B. 487. The question is whether R. E. Lembcke's conduct brings him within that decision. I have felt considerable difficulty as to this. No doubt he entered an *unconditional appearance*, asked for further time to file evidence, and *filed evidence on the merits* stating his official position, but *not raising any question of privilege*. Has he thereby waived his privilege? It seems to me that on this question there are three matters to be considered. In the first place, having regard

to the earlier cases as to the absolute nullity of proceedings against foreign public ministers I am satisfied that waiver, if it be possible, must be strictly proved. It implies *a knowledge of the rights waived*, and I am not satisfied that R. E. Lembcke when he entered appearance and took the subsequent steps was aware of his privilege. Secondly, knowledge of our common and statute law cannot be imputed to a foreign subject residing here as diplomatic agent of a foreign state. Thirdly, I am far from satisfied that a subordinate secretary can effectually waive his privilege without the sanction of his Sovereign or Legation, and it is clear that, whatever knowledge R. E. Lembcke possessed, the objection on the ground of privilege is now taken with the sanction and at the instigation of the Peruvian Legation.

To some extent my view is supported by the 'Jassy' (1906) (p. 27), 273, which was a motion to dismiss an action for damages by collision on the ground that the vessel proceeded against was the property of a foreign sovereign State and destined to its public use. On March 6, 1906, the plaintiffs issued a summons *in rem* addressed to the owners of the 'Jassy,' and on March 18 the 'Jassy' was arrested at Liverpool, but released on an undertaking to put in bail given by solicitors acting for the owners' agent. On March 22 appearance for the owners was entered, and on April 12 the owners raised the question of privilege. Gorell Barnes, P., said: 'The result is that the principle laid down in the Parlement Belge, 5 P. D. 197, applies, *in spite of the undertaking to put in bail and appearance entered by some agent in Liverpool* without the knowledge of the Roumanian Government and under a misappre-

hension as to the privilege enjoyed by a sovereign State in respect of the immunity of its public vessels from arrest. The action will be dismissed with costs.'

"There is one other matter to be considered. Whatever be the true view of R. E. Lembcke's conduct in entering appearance and taking the subsequent steps, it is clear that the summons must prove abortive against him. *No judgment or execution can be enforced or levied against him, and the authorities show the impropriety of allowing the action to go on merely for the purpose of defining his liability.*

On the grounds above stated I am of opinion that there has been no effective waiver established in this case and that the plea of privilege must prevail with costs since June 10, 1913, when the objection was first taken."

From this case it will be seen that under English Law there can be no implied waiver, no waiver of immunity without a full and complete knowledge on the part of the person making the waiver and the effect of his acts as such and intent to waive and authority on his part to perform the acts.

2. As to the suggestion of the defendant-in-error in his brief that by engaging in commerce and trade, if the plaintiff-in-error can be considered as having done so generally, the plaintiff-in-error waived its right to immunity, this does not appear to be the law.

The extent to which the immunity of publicly owned ships engaged in private business is recognized varies in different countries. In England and Scotland it is

recognized to the fullest extent. In the United States in the law of Federal Courts the weight of authority is in favor of immunity and against such waiver (*Roseric*, 254 Fed. 154 and the *Attualita*, 238 Fed. 909). In Germany the Court of Appeals of Hamburg held that the arrest of a vessel belonging to the United States Shipping Board was invalid even though the vessel was employed in ordinary commercial business.

3. Much stress is laid by defendant-in-error in his brief on the lack of sufficiently high diplomatic status of the consular officer who caused the appearance to be made in this action to claim or assert the sovereignty and immunity of his government. If this is true then surely no act of his can *waive* that immunity. If he has not a sufficiently high diplomatic status to enable him to assert his sovereign's immunity he has not sufficient status or authority to waive it, and as every act claimed as a waiver by the defendant-in-error was the act of the consular officer or done by his authority it follows that they were ineffective absolutely to constitute a waiver or consent to jurisdiction. There can be no waiver except by the sovereign itself. No act of any of its agents can constitute such a waiver (*Stanley* v. *Schwalby, supra*).

## POINT V.

### The suggestion of the Minister of the Republic of Portugal was submitted in the District Court in the only proper and possible manner.

I. This plaintiff-in-error filed its suggestion of want of jurisdiction by its duly accredited Minister Plenipo-

tentiary by offering it to the said District Court on the trial when and where it was accepted and admitted *without objection or exception* (Record, pp. 12, 13).

The procedure on the part of the plaintiff-in-error in the filing of the suggestion of its Minister was proper (*Ex Parte in Re State of N. Y. et al.*, 256 U. S. 490, 503; *In Re Baiz*, 135 U. S. 403; *The Adriatic*, 258 Fed. 902; *The Maipo*, 252 Fed. 627; *The Roseric*, 254 Fed. 154; *The Ragday*, 279 Fed. 130). In *The Maipo* (*supra*), the Court said:

> "While in many instances the suggestion that a ship is the property and in the possession of a foreign government would be made to the court by the proper official or department of our government I fail to find any support to the proposition that such course is necessary. (*In re Baiz*, 135 U. S. 403, 10 Sup. Ct., 854, 34 L. Ed. 222.) It is enough that the facts be presented to the court as here by the duly accredited official of the sovereign government."

The plaintiff-in-error was absolutely unable at any time to present or file the information and suggestion of its Minister with the Secretary of State for transmission by the Secretary of State to the Attorney General for submission to the Court; that is, through channels as laid down in cases of *Ex Parte Muir* (254 U. S. 522); *The Pesaro* (255 U. S. 216) and *Ex Parte Hussien Lufti Bey* (256 U. S. 216).

1. In this and other actions against this plaintiff-in-error or its property its Minister Plenipotentiary and Envoy Extraordinary did in person, as stated in the main

brief herein (p. 24), present the aforesaid suggestion to the Secretary of State with the request that it should be so transmitted to the Attorney General of the United States for submission to the Court, in accord with the aforesaid manner of advancing a claim of immunity as laid down in the aforesaid cases, but the Department of State refused to accept said suggestion or so to transmit the same to the Attorney General as requested by said Minister, and informed the plaintiff-in-error through its said Minister that the State Department had made a rule not to accept suggestions from Ministers of foreign nations in cases of this kind. A lawyer in said State Department cited to the said Minister as showing the manner in which said suggestion should be presented to the Court and the course to be followed, the cases of *The Ragday*, 279 Fed. 130; *The Maipo*, 259 Fed. 257, and *The Adriatic*, 258 Fed. 902.

2. Relying upon this information so given by the Department of State, the plaintiff-in-error submitted the suggestion and advanced its claim of immunity to the jurisdiction of the United States District Court as hereinbefore set forth, and in view of the said ruling of the State Department it would appear that the necessity of having a suggestion from a foreign Minister of the sovereignty and immunity of his government to the jurisdiction of the United States Courts come through the Department of State and the Attorney-General of the United States; that is, through the official channels, as indicated in the cases above cited has been removed, and that this course has been rendered impossible through the discontinuance of this practice by the State Department.

3. Since, therefore, the Department of State has made the aforesaid ruling and in accord therewith refused to accept and transmit the suggestion of the plaintiff-in-error and its claim of immunity through the official channels, as indicated in the cases above cited, it will be apparent to this Court that the plaintiff-in-error could not advance its claim of immunity in the manner as set forth in the said cases of *Ex Parte Muir*, *The Pesaro*, and *Ex Parte Hussein Lufti Bey* (*supra*). This being true, the plaintiff-in-error believes that this Court will not find that failure on its part so to file and submit its suggestion through the said official channels should bar it from the rights of immunity to which it is entitled as a sovereign nation.

4. If, on the other hand, it is still necessary for a sovereign government to advance its claim of immunity in the manner set forth in the said last cited cases, in spite of the ruling of the Secretary of State, then the ruling of the Secretary of State effectively deprives a sovereign government of all privilege or right to assert its immunity to the jurisdiction of our courts. Although the State Department is an executive or administrative department of the Government, by such ruling it assumes to decide whether or not a sovereign is entitled to immunity, that is to exercise a judicial function, or one beyond its province. It is not for the State Department to decide for itself whether or not a foreign sovereign is entitled to immunity in our courts.

5. The suggestion was properly presented. Coming from the Minister of Portugal, there could be no higher source of information. A public minister, as Mr. Justice Story said in *The Anne*, 3 Wheatley 435, 445, is invested

by virtue of his office with authority to vindicate the prerogatives of his sovereign. Our State Department assented to the presentation of the suggestion, as appears by the certification of the Secretary of State to Visconde d'Alte's official status. But it is argued that his suggestion should have been made by the government of the United States or one of the departments. On principle, this contention is unsound. As the doctrine of immunity is based upon the independence and dignity of the foreign sovereign, it cannot be that he must resort to the public authorities of another nation for the assertion of his rights. Such dependence would be incompatible with the recognition of independence. To deny a foreign sovereign the privilege of bringing suit in our courts or his right to assert for himself his immunity from suit, would be contrary to international comity (*The Sapphire*, 11 Wall. 164).

The procedure disclosed by the reported cases has not been uniform. While sometimes presented through the officials of the sovereign of the place (*The Exchange*, 7 Cranch 116), the suggestion has often been made directly by the accredited representative of the foreign sovereign (*The Maipo*, 252 Fed. 627; *The Constitution*, L. R. 4 P. D. 39; *The Crimdon*, 35 Times L. R. 81), or *by counsel* in his behalf as *amici curiae* (*The Roseric*, 254 Fed. 154; *The Adriatic*, 253 Fed. 489). In *The Tampico*, 16 Fed. 491, Judge Addison Brown, while stating that "objection to the jurisdiction alone might doubtless have been raised upon the information of the Attorney General of the United States, or the direct intervention of the accredited political representative of the Mexican Government," approved the intervention of any agent who could produce proper proof of his authority.

## POINT VI.

**The assumption of jurisdiction by the District Court herein and entry of the judgment against the plaintiff-in-error, was and is a violation of the existing treaty between the United States and the Republic of Portugal.**

1. The immunity of the Republic of Portugal and of its property to the jurisdiction of the United States Courts in the said action is insured to it by the treaty obligations existing between the Republic of Portugal and the United States (Appendix A, hereto attached).

This Treaty, by the most favored nation clause, reserves to the Consular officers of the Republic of Portugal the disposition of all disputes between the officers and crews of Portuguese ships, including those concerning wages, and assures to the Republic of Portugal, in that most favored nation clause the same rights and privileges as accorded to other sovereign nations under similar circumstances. It thus reserves these said rights and jurisdiction to Portugal for the reason that by treaty similar rights as to these disputes are reserved to the Consular Offices of the Netherlands (Consular Convention, Aug. 1st, 1879, Art. 11) and other sovereigns (Sweden and Norway; Treaties of July 4, 1827 [8 Stat. 352, Art. 13]; and of June 1, 1910 with Sweden).

Under this Treaty the Republic of Portugal must be treated in matters of disputes such as involved in this action, on the same footing as other foreign sovereigns and the District Court had no jurisdiction in this action, particularly as it was not conferred upon it by

the Seaman's Act, as pointed out in Point I of this reply brief.

2. The treaty between this country and a friendly sovereign power is the supreme law of the United States, before which judgments and decrees of our courts in conflict therewith must give way. It stands upon a par with the Constitution and is equivalent to an act of the Legislature. It is the duty of our courts, and particularly of the United States Supreme Court, to enforce such treaties even to the extent of nullifying the judgments and decrees of the courts. (*Moodie* v. *The Phoebe Anne*, 3 Dall. 319; *The U. S. Schooner Peggy*, 1 Cranch, 103; *Foster* v. *Neilson*, 2 Pet. 253; *Wilson* v. *Wall*, 6 Wall. 83, 89; *Reichart* v. *Felps*, 6 Wall. 160; *Smith* v. *Stevens*, 10 Wall. 321; *Holden* v. *Joy*, 17 Wall. 211; *Martin* v. *Hunters Lessee*, 1 Wheat. 304; *Foster* v. *Neilson*, 2 Peters 253; and *United States* v. *Perchenan*, 7 Peters 51.)

In the case of *Martin* v. *Hunter's Lessee*, 1 Wheaton 304, the Court held that the Appellate jurisdiction of the Supreme Court extended to all cases where, a treaty having been drawn into question, the decision has been against the validity of the treaty or of a right or title claimed under it, and in such a case the Court is not restricted to the abstract question of treaty construction but has jurisdiction to examine and render a decision upon the claim of right or title actually made.

The whole question involved in the case at bar is whether technical rules of procedure shall be permitted to override principles cardinal in the law of nations. The plaintiff-in-error in this case was and is a depart-

ment of the sovereign Government of Portugal, and the judgment against it should not be permitted to be enforced.

3. The treaty between the United States and Portugal also provides that *merchant* ships owned and operated by the sovereign Government of Portugal or any department thereof should be granted and accorded the same status in the courts of the United States as the ships similarly owned and/or operated by the Government of the United States or any department thereof. Ships owned by the United States and owned and/or operated by the United States Shipping Board are not subject to libel *in rem* in the courts of the United States and the United States cannot be sued in admiralty on claims arising out of such ships or their operation *without its specific statutory consent.* Therefore, under the said treaty between the United States and Portugal, no vessel, even if it be a merchant vessel, *belonging to* or operated by a department of the sovereign Government of Portugal can be subject to libel *in rem* or process of the courts of the United States, nor should the Government of Portugal be subject to a suit on any claim involving any of *its* sovereign owned vessels, whether they be merchant vessels or not *without its consent similarly given.* The significance and sanctity of treaties between sovereign governments as such can not properly be overridden and displaced by any technical rules of procedure in the courts of this Government.

4. So that whether the vessel involved was a merchant vessel privately owned or a public vessel owned by the Government of Portugal, the Court had no juris-

diction in this case. If the "Goa" was a privately owned vessel, as shown in Point I, *supra*, the Court was for the reasons there given without jurisdiction as the action was between aliens, and as under the treaty which for the reasons stated in said Point I, was not abrogated by the Seaman's Act, the dispute involved was reserved to the Consular officers of Portugal for adjustment, and, if it was a public vessel, the same would be true, and the Court would also be without jurisdiction under the provisions of the treaty last cited, securing to Portuguese vessels in our ports the same rights, privileges and status as publicly owned vessels of the United States.

5. Finally where a treaty prescribes a rule by which rights can be determined, the courts will apply this rule (*Leighton* v. *United States*, 29 Ct. Cl. 288). The treaty between the United States and Portugal prescribes the rule that the sovereign public vessels of Portugal should be immune from the process and jurisdiction of our courts as shown above, just as vessels of the United States are immune and the United States cannot be sued *without* its legislative consent, and therefore it is respectfully urged that the judgment herein should be reversed.

6. Since clearly, therefore, the enforcement of the judgment of the District Court in this case is a violation of the treaty obligations of the United States and of the treaty rights of the Republic of Portugal, it is obvious that this Court in the exercise of its function of preventing said violation of treaty obligations and rights even to the extent of nullifying the judgments and decrees of the courts of the United States should prevent the enforcement of said judgment by a

reversal regardless of any technicality as to how the question is before this Court. This Court can take judicial notice of the lack of jurisdiction of the District Court and of the provisions of the treaty and the rights and obligations of the high contracting powers thereto, and of its own motion can and should take such action as may be necessary to prevent the exceeding of its jurisdiction on the part of the District Court and to insure the enforcement of the treaty.

7. In the case of *The Oliver American Trading Co. v. The Government of the United States of Mexico* (*supra*, p. 23), the immunity of the Republic of Mexico was upheld by the District Court, whether or not there was a general appearance by the Republic of Mexico and its Sovereignty was thus assured to it, and the appeal from this decision was on the 7th day of April, 1924, dismissed by this Court. In view of this fact under the favored nation clause of the said treaty, which assures the same rights and privileges to the Republic of Portugal as to any other sovereign, the sovereign immunity of the plaintiff-in-error should be sustained by this Court, and the said judgment of the said District Court against the plaintiff-in-error should be reversed.

Dated, New York City, April 30th, 1924.

F. DUDLEY KOHLER,
*Attorney for Plaintiff-in-Error,*
Office and P. O. Address,
25 Broadway,
Borough of Manhattan,
City and State of New York.

## Appendix A.

Treaty Series, No. 514½

COMMERCIAL ARRANGEMENT
EFFECTED BY EXCHANGE OF NOTES BETWEEN
THE UNITED STATES AND PORTUGAL

Signed at Washington, June 28, 1910

[*The Portuguese Minister to the Acting Secretary of State.*]

LEGACAO DE PORTUGAL.
NOS
ESTADOS UNIDOS.

[Translation.]

The undersigned, Envoy Extraordinary and Minister Plenipotentiary of His Majesty the King of Portugal and of the Algarves, duly authorized to that effect by his Government, has the honour to notify His Excellency the Acting Secretary of State of the United States of America, that, in view of the issuance by the President of the United States of America of the proclamations of January 29th, 1910 and of February 21st, 1910, extending to imports into the United States of America from the Kingdom of Portugal and the Azores and Madeira islands and from the Portuguese possessions, the benefit of the complete minimum tariff of the United States of America, it having been ascertained that no undue discrimination was being exercised in the Kingdom of

Portugal, the Azores and Madeira islands or the Portuguese possessions, against the United States of America or the products thereof, and the principle of special concessions by Portugal to Spain and Brazil having thus been recognized, the Portuguese Government has decided to grant the citizens, merchandise and ships of the United States of America the same treatment in Portugal and her possessions as that accorded to the citizens, merchandise and ships of the most favoured nation on the condition that the subjects, merchandise and ships of Portugal and of her possessions will likewise be treated in the United States of America in the same manner as those of the most favoured nations.

The undersigned avails himself of this opportunity in order to convey to the Honourable the Acting Secretary of State of the United States the renewed assurances of his highest consideration.

VISCOUNT D'ALTE

WASHINGTON, *June 28, 1910.*

The Honorable HUNTINGTON WILSON,
*Acting Secretary of State,*
*etc., etc., etc.,*

The undersigned, Acting Secretary of State of the United States of America, has the honor to acknowledge the receipt of the note of today's date in which His Excellency the Envoy Extraordinary and Minister Plenipotentiary of His Majesty the King of Portugal and of the Algarves, has been good enough to inform him that:

> in view of the issuance by the President of the United States of America of the proclamations of January 29th, 1910, and of February 21st, 1910, extending to imports into the United States of America from the Kingdom of Portugal, the Azores and Madeira islands and from the Portuguese possessions, the benefit of the complete minimum tariff of the United States of America, it having been ascertained that no undue discrimination was being exercised in the Kingdom of Portugal, the Azores and Madeira islands or the Portuguese possessions, against the United States of America or the products thereof, and the principle of special concessions by Portugal to Spain and Brazil having thus been recognized, the Portuguese Government has decided to grant the citizens, merchandise, and ships of the United States of America the same treatment in Portugal and her possessions as that accorded to the citizens, merchandise, and ships of the most favoured nations on the condition that the subjects, merchandise, and ships of Portugal and of her possessions will likewise be treated in the United States of America in the same manner as those of the most favoured nations.

Taking note of this declaration the undersigned hastens to declare, in the name of the Government of the United States of America, that the subjects, merchan-

dise, and ships of Portugal and of her possessions will be treated in the United States of America in the same manner as those of the most favoured nations.

The undersigned begs His Excellency the Envoy Extraordinary and Minister Plenipotentiary of His Majesty the King f Prtugal and f the Algarvs to accept the renewed assurances of his highest consideration.

HUNTINGTON WILSON
*Acting Secretary of State.*

WASHINGTON, *June 28, 1910.*

His Excellency the Envoy Extraordinary and
Minister Plenipotentiary of His Majesty the
King of Portugal and of the Algarves,
*etc., etc., etc.*